Supreme Court U.S.
F I L E D
AUG 23 1989
JOSEPH F. SPANIOL, JR.
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No. 88-2026

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CLEMENT J. PACYNA, PETITIONER
MSG, U.S. Army, Retired

vs.

JOHN O. MARSH, JR., in his capacity as Secretary of the Army, Army Board for Correction of Military Records, and JOHN W. MATTHEWS, in his capacity as Executive Secretary of the Board

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER IN REPLY

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-2620

CLEMENT J. PACYNA, Petitioner,

vs.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER IN REPLY

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) and the opinion of the district court (Pet. App. C) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on 10 February, 1989. The timely petition for rehearing, with suggestion for en banc rehearing, was denied on 13 April, 1989 (Pet. App. B). The jurisdiction of this Court is invoked under

28 U.S.C. §1254(1).

PRELIMINARY STATEMENT

The irresponsible action of the government evident in the petitioner's brief plus its exaggerated or misrepresentative argument and cases cited in its brief, are indicative to petitioner of is continued careless effort and attempt to induce this Court to continue to break the law to rule in its favor not only against a statutory issue but on a promotion issue intended only for Congress, the executive branch, or President (Pet. Brief, Points III & V).

REBUTTAL

1. The government's first argument (pg. 7) that petitioner claimed that "his promotion claim was in effect a contract claim", is simply erroneous. When in fact no such claim was made by petitioner because he claimed that he cannot benefit from a position to which he was not appointed (Pet. Brief, Point V). Therefore, the

court at the outset, clearly lacked subject matter jurisdiction under 28 U.S.C. §1346. Significantly, the government from the very outset "vigorously urged that the court does not have jurisdiction under any theory" (Pet. Brief, Point VII and Pet. App. D6, opinion of the first district court or Judge Curtin).

2. The government next argued (pg. 8) that the Courts below properly found that petitioner's present claim is barred by res judicata, which is further simply erroneous. As petitioner's first lawsuit on a claim for a position not had by him in 1952, aforementioned, was outside the scope of the court under §1346 (Pet. Brief, Point VI), the court could not legally bar suit by the statute of limitations, but could only dismiss for lack of jurisdiction (Pet. Brief, pg. 24, par. 1, pg. 30, par 5).

3. The government's next argument (pg. 10) that petitioner claimed that he was

denied due process on a claim in 1952, is furthermore simply erroneous. Correctly, petitioner's claim is that he was denied due process on a timely filed claim accrued in 1982 for review of agency action, rendered arbitrary, capricious or contrary to law, conferred by statute 5 U.S.C. §702, 10 U.S.C. §1552 and 28 U.S.C. §1361 (Pet. Brief, pg. 25, par. 2, pg. 27, par. 3 and pg. 29, par. 4). The claim has not been litigated to date (Pet. Brief, pg. 25, par. 2, pg. 27, par. 3).

4. The government's final argument (pg. 10) that a fact concisely against a grant of certiorari in this case is the unsubstantiated nature of petitioner's underlying claim that he has not articulated any reason why he was entitled to a promotion and that as the government concluded that petitioner has not explained "why the action to appoint him was illegal or in violation of regulations", is furthermore

simply erroneous. First, the prevalent Army violations, which the government or board had before it, and which are clearly proven/documented on the face of the record (Pet. Brief, pg. 14, par. 5 and pg. 15, par. 6). SECOND, case law holds that the plaintiff would not be required to prove that for the Army's violations of its own regulations he would or probably would have been appointed. Sanders v. U.S., 594 F.2d 804, 1979. (Pet. Brief to court of appeals, pg. 16, par. 2e).

CONCLUSION

The government's argument should be denied and the petitioner's writ of certiorari should be granted, in the interest of substantial justice.

Respectfully submitted.

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19 August, 1989